In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 200

PAUL JOHN CARBO AND JOSEPH SICA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 357 F. 2d 800.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1966. A petition for rehearing by Sica was denied on May 9, 1966. The petition for a writ of certiorari was filed on June 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' convictions were subject to collateral attack on the ground that a judge appointed

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to perform the remaining duties of the trial judge, who died after verdict, had formed an impression of the views of the trial judge.

STATEMENT

Petitioners and others were convicted after a trial by jury in the United States District Court for the Southern District of California of conspiracy to obstruct commerce by extortion in violation of 18 U.S.C. 1951, and substantive violations. The trial lasted from February 20, 1961 until May 30, 1961. After the jury had returned its verdict, the trial judge, Judge Tolin, denied as to petitioners the motions for judgment of acquittal on which he had reserved decision. While motions for a new trial were pending, Judge Tolin died. Judge Boldt, who was assigned to succeed him, denied the motions after making a nine-volume abstract of the trial testimony. Petitioner Carbo was sentenced to twenty-five years' imprisonment and fined $10,000. Petitioner Sica was sentenced to twenty years' imprisonment and fined $10,000. On appeal, the judgments on the charges specified above were affirmed. 314 F. 2d 718, certiorari denied, 377 U.S. 953.

After denial of the petitions for writs of certiorari, petitioner Sica and a co-defendant made a motion for reduction of sentence. During the argument on that motion, counsel said that he had personally talked with Judge Tolin about the case and that the court "in the spirit that Judge Tolin would have treated this matter should grant this man probation and modify the judgment" (1 R. 80). Judge Boldt replied

that he had had occasion to see Judge Tolin after the verdict, and had some ideas of his views of the case, and he believed that the sentences imposed were more lenient than those that Judge Tolin might or would have imposed (1 R. 80–81). Thereafter petitioners separately filed motions under 28 U.S.C. 2255, collaterally attaching their convictions on the ground that Judge Boldt, when he assumed the duties of successor judge, had already received information from Judge Tolin about the case (1 R. 2–9, 94–105). Each asked that the matter be set for hearing before another judge and that Judge Boldt be called as a witness (1 R. 33–34, 42–44, 111–112).

On January 22, 1965, Judge Boldt filed an affidavit in which he stated that "[n]either the matter of sentence, nor any evidence, procedure, issue or ruling involved * * * was ever so much as mentioned to me or in my presence by Judge Tolin at any time or place." He said that his impression of Judge Tolin's views was derived not from any statements made by him, but from his appearance during the trial, which indicated a heavy burden and strain. He stated that these impressions "to no extent and in no manner whatever entered into [Judge Boldt's] study, consideration or ruling on any matter involved in the case" and played no part whatever in the sentence which he imposed. He also stated that his final meeting with Judge Tolin occurred some days after the verdict, when Judge Tolin indicated that he felt the urgent need of a restful period after such a strenuous and lengthy trial. Judge Boldt added that he had not

been a close acquaintance of Judge Tolin and that he had never met with Judge Tolin alone during the course of the trial (1 R. 30–32).

At the hearing on the motions before Judge Boldt, the court reporter acknowledged that his original stenotype notes concerning the statement made by Judge Boldt at the time of sentencing differed in minor respects from the version in the official transcript as filed (2 R. 38–41).[1] Judge Boldt explained

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[1] The original version stated (1 R. 80–81):

"Some reference was made by one of the counsel to a conversation with Judge Tolin concerning this case, or some remarks of Judge Tolin concerning it. And I should say that I have pretty well in mind Judge Tolin's views of the case, since we were operating at the other ends of the same hall during the same period and we quite often saw each other at lunch, and I had occasion to see Judge Tolin after the verdict in this case and before my case was concluded, and I had some ideas of his views of the case. From that I can say and affirm without any question whatever that the sentences I imposed, I believe, were more lenient than those that Judge Tolin would have imposed."

The corrected version stated (1 R. 82):

"Some reference was made by one of the counsel to a conversation with Judge Tolin concerning this case, or some remarks of Judge Tolin concerning it. ~~And~~ I should say that I have pretty well in mind Judge Tolin's views of the case, since we were operating at ~~the other~~ opposite ends of the same hallway during the same period and we quite often saw each other at lunch~~,~~. ~~and~~ I had occasion to ~~see~~ talk with Judge Tolin after the verdict in this case, ~~and~~ before my case was concluded, and ~~I had~~ received some ideas of his views ~~of the~~ after the verdict in this case."

"~~From that~~ I can ~~say and~~ affirm without any question whatever that the sentences I imposed~~, I believe,~~ were more lenient than those ~~that~~ Judge Tolin ~~would~~ might have imposed." (Words deleted are crossed out, and words added are underlined.)

that this difference resulted from his practice of reviewing transcripts for the purpose of correcting grammar and stenographic errors and that, in this review, he eliminated repetition and clarified his statements (2 R. 56–58). Judge Boldt also said that his affidavit had answered the relevant allegations and that he therefore refused to be sworn as a witness or to be interrogated further (2 R. 58). He also stated "* * * I in no manner whatever, at any time or place or under any circumstances in any manner whatever discussed any phase of the trial with Judge Tolin, either before or after verdict, or up until the time of his death. I have made that unqualifiedly on oath, and I now reaffirm it on my honor and integrity as a United States District Judge. * * * I make this most solemnly, and with a very, very heavy sense of obligation. I hold as high an office, in my judgment, as man is given to hold. And in the most solemn manner, and without any reservation whatever, I am making this affirmation that I make * * *." (2 R. 62.) He pointed out that his remarks about the views of Judge Tolin were made only after he had examined the transcript of the trial judge's remarks in the case (2 R. 68–69). He said that it was absolutely not true that Judge Tolin communicated his views about the case to him (2 R. 72–73; see also 2 R. 75). He also said that he put his statement in affidavit form "to emphasize that it was carefully and thoroughly prepared with a view to stating the exact and complete and unqualified truth" (2 R. 58).

At the conclusion of the hearing, Judge Boldt denied the motions to vacate, finding them to be with-

out merit "assuming any possible interpretation of my July 17, 1964 remarks most favorable to petitioners' contentions." He noted that there was no claim made that he had a personal bias or prejudice in the case (1 R. 79–83, 116–120). The court of appeals affirmed this ruling.

ARGUMENT

Petitioner's motions to vacate sentence were clearly insubstantial even on petitioners' construction of the sentencing judge's remarks. Even if Judge Boldt had discussed Judge Tolin's views with him, that would not disqualify Judge Boldt from acting either on the motion for a new trial or determining the sentence. Even a juror who enters the courtroom with an opinion on the merits of a case may properly determine guilt if he can lay aside his preconceptions. See *Irvin* v. *Dowd,* 366 U.S. 717, 723. It follows *a fortiori* that a judge who undertakes to abstract a lengthy record and who is more experienced in laying aside preconceptions may fairly decide a case free of impressions gained from casual conversations with his brethren. Nor, indeed, do we believe that it would have been improper for Judge Boldt to consider, in determining the appropriate sentence, along with the other material which might be included in a probation report or any other document studied in preparation for the sentencing decision, the views of the deceased trial judge.

Petitioners' motions were, therefore, so clearly without merit that Judge Boldt would have been justified in denying them without a hearing. The fact

that he chose instead to make a formal declaration clarifying his remarks did not render him a material witness so as to disqualify him from acting on the motion. There was, in short, no warrant for calling Judge Boldt as a witness; hence he could properly decide the motions to vacate.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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